

GAO

Testimony

Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, Committee on Government Reform and Oversight, House of Representatives

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**CONGRESSIONAL REVIEW
ACT**

**Update on Implementation
and Coordination**

Statement of Robert P. Murphy, General Counsel



Chairman McIntosh, Mr. Tierney, and Members of the Subcommittee:

I am pleased to appear before you today to discuss the General Accounting Office's experience in fulfilling its responsibilities under the Congressional Review Act (CRA) and our efforts to coordinate implementation of the Act with the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA).

Since I testified before this Subcommittee on March 10, 1998, in some areas we have seen enhanced cooperation from OIRA in implementing the CRA. In addition, executive branch and independent agencies appear to be more cognizant of their responsibilities under the requirements of the CRA. However, there remain areas of concern. After a brief review of the operation of the statute, I will discuss what progress has been made in four areas during the past 3 months.

Under CRA two types of rules, major and nonmajor, must be submitted to both Houses of Congress and the GAO before either can take effect. CRA defines a "major" rule as one which has resulted in or is likely to result in (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets. CRA specifies that the determination of what rules are major is to be made by OIRA. Major rules cannot be effective until 60 days after publication in the Federal Register or submission to Congress and GAO, whichever is later. Nonmajor rules become effective when specified by the agency, but not before they are filed with the Congress and GAO.

GAO's primary role under CRA is to provide the Congress with a report on each major rule concerning GAO's assessment of the promulgating federal agency's "compliance with the procedural steps" required by various acts and executive orders governing the regulatory process. These include preparation of a cost-benefit analysis, when required, and compliance with the Regulatory Flexibility Act, the Unfunded Mandates Reform Act of 1995, the Administrative Procedure Act, the Paperwork Reduction Act, and Executive Order No. 12866. GAO's report must be sent to the congressional committees of jurisdiction within 15 calendar days.

Although the law is silent as to GAO's role relating to the nonmajor rules, we believe that basic information about the rules should be collected in a manner that can be of use to Congress and the public. To do this, we have established a database that gathers basic information about the 15-20 rules we receive on the average each day. Our database captures the title, the agency, the Regulation Identification Number, the type of rule, the proposed effective date, the date published in the Federal Register, the congressional review trigger date, and any joint resolutions of disapproval that may be enacted. We have made this database available, with limited research capabilities, on the Internet. I will discuss shortly our belief that this database would have more significant value to the Congress if the executive branch agencies would cooperate with GAO and provide additional information relevant to each rule.

Since the congressional rulemaking review provisions of CRA were enacted on March 29, 1996, our Office has received 131 major and 9,052 nonmajor rules from executive branch and independent agencies.

Unfiled Rules

As noted earlier, before a rule can become effective, it must be filed in accordance with the statute. Prior to the March 10 hearing, GAO conducted a review to determine whether all final rules covered by CRA and published in the Federal Register were filed with the Congress and GAO. We performed this review to both verify the accuracy of our database and to ascertain the degree of agency compliance with CRA.

Our review covered the 10-month period from October 1, 1996, to July 31, 1997. In November 1997, we submitted to OIRA a computer listing of the rules that we found published in the Federal Register but not filed with our Office. This initial list included 498 rules from 50 agencies. OIRA distributed this list to the affected agencies and departments and instructed them to contact GAO if they had any questions regarding the list. Beginning in mid-February, because 321 rules remained unfiled, we followed up with each agency that still had rules which were unaccounted for. OIRA did not participate in the follow-up effort.

Our Office experienced varying degrees of responses from the agencies. Several agencies, notably the Environmental Protection Agency and the Department of Transportation, took immediate and extensive corrective action to submit rules that they had failed to submit and to establish fail-safe procedures for future rule promulgation. Other agencies responded by submitting some or all of the rules that they had failed to

previously file. Several agencies are still working with us to assure 100 percent compliance with CRA. Some told us they were unaware of CRA or of the CRA filing requirement.

Overall, our review disclosed, as of the March 10 hearing, that:

- 279 rules should have been filed with us; 264 of these have subsequently been filed;
- 182 were found not to be covered by CRA as rules of particular applicability or agency management and thus were not required to be filed;
- 37 rules had been submitted timely and our database was corrected; and
- 15 rules from six agencies had not been filed.

As we noted at the hearing, we believe OIRA should have played a role in ensuring that agencies were both aware of the CRA filing requirements and were complying with them.

Last week, our Office concluded a second review covering the 5-month period from August 1, 1997, to December 31, 1997, which we conducted in the same manner as the prior review.

The initial list which we forwarded to OIRA on April 2 for distribution to the concerned agencies contained 115 rules from 21 agencies. On June 2, OIRA agreed to follow up with the agencies that had not responded. As of June 11, 45 of the 115 rules had been filed; 25 were found not to be subject to CRA because they were rules of particular applicability or agency management and 24 had been previously timely submitted and our database was corrected. Twenty-one rules from eight agencies remain unfiled.

I would like to point out two areas which show improvement. First, the number of unfiled rules which should have been filed were 66 for the 5-month period. This is down markedly from the 279 for the prior 10-month review, thus indicating a more concerted effort on the part of the agencies to fulfill their responsibilities under CRA. Secondly, OIRA has become more involved and conducted the follow-up contacts with the agencies after OIRA's distribution of the initial list.

Sixty-Day Delay and “Good Cause”

Some agencies failed to delay the effective date of some major rules for 60 days as required by section 801(a)(3)(A) of the Act. At the time of my prior testimony, the effective date of eight major rules had not been delayed.

Agencies were not budgeting enough time into their regulatory timetable to allow for the delay and were misinterpreting the “good cause” exception to the 60-day delay period found in section 808(2).

Section 808(2) states that, notwithstanding section 801, “any rule which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest” shall take effect at such time as the federal agency promulgating the rule determines. This language mirrors the exception in the Administrative Procedure Act (APA) to the requirement for notice and comment in rulemaking. 5 U.S.C. § 553(b)(3)(B). In our opinion, the “good cause” exception is only available if a notice of proposed rulemaking was not published and public comments were not received. Many agencies, following a notice of proposed rulemaking, have stated in the preamble to the final major rule that “good cause” existed for not providing the 60-day delay. Examples of reasons cited for the “good cause” exception include (1) that Congress was not in session and thus could not act on the rule, (2) that a delay would result in a loss of savings that the rule would produce, or (3) that there was a statutorily mandated effective date.

The former administrator of OIRA disagreed with our interpretation of the statutory “good cause” exception. She believed that this interpretation would result in less public participation in rulemaking because agencies would forgo issuing a notice of proposed rulemaking and receipt of public comments in order to invoke the CRA “good cause” exception. OIRA contends that the proper interpretation of “good cause” should be the standard employed for invoking section 553(d)(3) of the APA, “as otherwise provided by the agency for good cause found and published with the rule,” for avoiding the 30-day delay in a rule’s effective date required under the APA.

Since CRA’s section 808(2) mirrors the language in section 553(b)(B), not section 553(d)(3), it is clear that the drafters intended the “good cause” exception to be invoked only when there has not been a notice of proposed rulemaking and comments received.

In the last 3 months, our Office has not reviewed a major rule that did not properly comply with the 60-day delay requirement. Also, the “good cause” exception has been properly employed in those instances where no notice of proposed rulemaking was issued or comments received. Finally, agencies are alerting the public, in the final rule publication in the Federal

Register, that the 60-day effective date stated in the rule may be delayed due to the need to comply with the CRA. The Health Care Financing Administration (HCFA) of the Department of Health and Human Services, in a recent Medicare rule, contained such a notice, and since HCFA's submission of the rule was 5 days later than the publication of the rule in the Federal Register, the effective date was delayed in accordance with the CRA.

Definitions of Rules and Major Rules

One early question about implementation of CRA was whether executive agencies or OIRA would attempt to avoid designating rules as major and thereby avoid GAO's review and the 60-day delay in the effective date. While we are unaware of any rule that OIRA deliberately misclassified to avoid the major rule designation, mistakes have been made in major rule classifications. Also, the failure of agencies to identify some issuances as "rules" at all has meant that some major rules have not been identified.

CRA contains a broad definition of "rule," including more than the usual "notice and comment" rulemakings under the Administrative Procedure Act which are published in the Federal Register. "Rule" means the whole or part of an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy.

Recently, we compared an OIRA-prepared list of important final rules that it reviewed during the first year of the CRA to the list of rules that OIRA and the agencies had identified to us as major during the same period. We found that 12 rules on our list of major rules were not on OIRA's list. OIRA officials said that, in retrospect, they and the agencies should not have identified 7 of those 12 rules as major. The OIRA list also contained 8 rules that were not on our list of 122 major rules. Of these, OIRA officials said that all eight should have been identified and submitted to us as major rules. OIRA officials noted that all of these rules were issued in the first year of the congressional review process, and that they and the agencies were still learning how to respond to the statutory requirements. We are currently following up with OIRA and the agencies that issued these rules to determine whether they should be added to or subtracted from our list of major rules.

As I noted in my prior testimony, on occasion, our Office has been asked whether certain agency action, issuance, or policy constitutes a "rule" under CRA such that it would not take effect unless submitted to our Office and the Congress in accordance with CRA. For example, in response to a

request from the Chairman of the Subcommittee on Forests and Public Land Management, Senate Committee on Energy and Resources, we concluded that a memorandum issued by the Secretary of Agriculture in connection with the Emergency Salvage Timber Sale Program constituted a “rule” under CRA and should have been submitted to the Houses of Congress and GAO before it could become effective.

Likewise, we concluded that the Tongass National Forest Land and Resource Management Plan issued by the United States Forest Service was a “rule” under CRA and should have been submitted for congressional review. There are 123 forest plans covering all 155 forests in the National Forest System. Each plan must be revised and reissued every 10 years.

OIRA stated that, if the plan was a rule, it would be a major rule. In testimony before the Senate Committee on Energy and Natural Resources and the House Committee on Resources regarding the Tongass Plan, the Administrator of OIRA stated that, as was the practice under the APA, each agency made its own determination of what constituted a rule under CRA and by implication, OIRA was not involved in these determinations.

We continue to believe that for CRA to achieve what the Congress intended, OIRA must assume a more active role in guiding or overseeing these types of agency decisions. Other than an initial memorandum following the enactment of CRA, we are unaware of any further OIRA guidance. Because each agency or commission issues many manuals, documents, and directives which could be considered “rules” and these items are not collected in a single document or repository such as the Federal Register, it is difficult to ascertain if agencies are fully complying with CRA.

We note certain congressional committees are taking an active role in overseeing agency compliance with the CRA. For example, the Joint Committee on Taxation has corresponded with the Internal Revenue Service (IRS) as to what should be submitted. Therefore, IRS procedures, rulings, regulations, notices, and announcements are forwarded as CRA submittals. Also, in response to the request of the House Committee on Education and the Workforce, the Departments of Labor and Education deliver their CRA submissions with a monthly summary directly to the Committee, in addition to our Office and both Houses of Congress as required by the CRA.

Database Enhancement

As we discussed at your March hearing, we have attempted to work with executive agencies to get more substantive information about the rules and to get such information supplied in a manner that would enable quick assimilation into our database. An expansion of our database could make it more useful not only to GAO for its use in supporting congressional oversight work, but directly to the Congress and to the public.

In the initial development of the questionnaire, we consulted with executive branch officials to insure that the requested information would not be unnecessarily burdensome. We circulated the questionnaire for comment to 20 agency officials with substantial involvement in the regulatory process, including officials from OIRA. The Administrator of OIRA submitted a response in her capacity as Chair of the Regulatory Working Group, consolidating comments from all the agencies represented in that group. It was the position of the group that the completion of this questionnaire for each of the 4,000 to 5,000 rules filed each year is too burdensome for the agencies concerned.

On April 22 of this year we again contacted OIRA officials with a modified version of our questionnaire, which we believed addressed the major concerns raised with the initial version. We have subsequently met with officials from OIRA and a select group of executive agency officials, at their request, to explore additional ways to capture the information. We are currently reviewing an alternative, but we believe inadequate, version of the questionnaire proposed by those officials and will meet next week to continue negotiations on this matter.

We continue to believe that it would further the purpose of CRA for a database of all rules submitted to GAO to be available for review by Members of Congress and the public and to contain as much information as possible concerning the content and issuance of the rules. We believe that further talks with the executive branch, led by OIRA, can be productive and that there may be alternative approaches that address both congressional and executive branch concerns.

Conclusion

CRA gives the Congress an important tool to use in monitoring the regulatory process, and we believe that the effectiveness of that tool can be enhanced. Executive Order 12866 requires that OIRA, among other things, provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law. After 2 years' experience in carrying out our responsibilities under the Act, we can

suggest several areas in which OIRA should exercise more leadership within the executive branch regulatory community, consistent with the intent of the Executive Order, to enhance CRA's effectiveness and its value to the Congress and the public. We believe that OIRA should:

- develop a standardized reporting format that can readily be incorporated into GAO's database providing the information of most use to the Congress, the public, and GAO;
- establish a system to monitor compliance with the filing requirement on an ongoing basis; and
- provide clarifying guidance as to what is a rule that is subject to CRA and oversee the process of identifying such rules.

Thank you, Mr. Chairman. This concludes my prepared remarks. I would be happy to answer any questions you may have.

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